

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ELDRIDGEVERCIL MOORE,

Defendant-Appellant.

UNPUBLISHED

January 8, 2008

No. 273912

Oakland Circuit Court

LC No. 06-207932-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant was found guilty by a jury of possession with intent to deliver 50 grams or more but less than 450 grams of a mixture containing the controlled substance cocaine, MCL 333.7401(2)(a)(iii), and was sentenced as a third habitual offender, MCL 769.11, to 99 months' to 40 years' imprisonment. He appeals by right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On March 30, 2006, the Oakland County Sheriff's office used an informant to purchase two ounces of crack cocaine. The informant spoke to his contact, Greene, and arranged for the sale to take place in a hotel parking lot. Defendant was driving a truck in which Greene and a woman named Ms. Carey were passengers.

The informant, who was waiting at the hotel, went up to the truck when it arrived. The informant said he had to go back to get the money. When the informant left, the police stopped the truck and found 56 grams of cocaine inside it during a search.

Ms. Carey told police she would cooperate. She provided them with verbal and written statements as well as an Upper Peninsula address and two phone numbers. Subsequently, Ms. Carey appeared and testified at the preliminary examination.

Approximately one week before the trial, the sheriff's office made many attempts to contact Ms. Carey at both phone numbers to secure her presence at the trial. The investigating officer left numerous messages on Ms. Carey's cellular phone, but the outgoing voice message stated she would be out of town until Tuesday, which was two days before the trial. Additionally, the prosecutor contacted the Michigan State Police post near Ms. Carey's Upper Peninsula address requesting assistance in serving a subpoena on Ms. Carey. Troopers went to

the address twice in the week before the trial and again during the week of the trial. All attempts to serve Ms. Carey and obtain her presence at the trial were unsuccessful.

Just before trial, a due diligence hearing was held to determine if Ms. Carey's testimony from the preliminary examination could be admitted in evidence under MRE 804(b)(1). The trial court found that the prosecution had exercised due diligence. Consequently, Ms. Carey was deemed unavailable, so her prior testimony was allowed to be read at trial.

According to Ms. Carey's preliminary examination testimony, she and defendant picked up Greene on March 30, 2006, and made two stops before going to the hotel. After one of the stops Greene went back to the truck and handed Ms. Carey a baggy that was wrapped. Before getting to the hotel, Ms. Carey gave the package back to Greene. But when the police came up to the truck he tried to give to her again, but she tossed it away in the truck. According to Ms. Carey, defendant never handled the package from Greene.

Defendant testified that he picked up Greene that night because Greene needed a ride and offered to give defendant \$20 for gas money. Defendant testified that he did not know Greene was delivering cocaine. Defendant knew Greene was getting cocaine, but defendant thought it was just a small amount for defendant to smoke. On the night of the incident, defendant told one police officer that he knew Greene sold dope, but he did not know Greene was selling that night. Defendant told another police officer that he knew Greene was delivering dope, but he did not know how much Greene had on him. Greene did not testify at the trial.

On appeal, defendant argues that the trial court abused its discretion in finding due diligence and allowing Ms. Carey's prior testimony to be read at trial. Defendant also argues he was denied effective assistance of counsel due to trial counsel's failure to call Greene to testify.

At trial, the prosecution may present a witness's preliminary examination testimony if the witness is unavailable according to MRE 804(a)(5). *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). A witness is considered unavailable in situations where the declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5).

To show that a witness is unavailable the prosecution must show that it has made a diligent good-faith effort to locate a witness for trial. *Bean, supra* at 684. The test is not whether more stringent efforts would have produced the testimony, but rather it is a test of reasonableness and is determined on a case-by-case basis. *Id.* We review the trial court's determination of due diligence for an abuse of discretion. *Id.*

In the present case, the prosecution had contact information for Ms. Carey that quickly led to obtaining her presence for the preliminary examination. That information was once again used to secure her presence at the trial. One week before trial began, an officer made numerous calls to both of the phone numbers supplied by Ms. Carey, leaving several phone messages. A recorded message on Ms. Carey's phone stated that she would be out of town until Tuesday, which was two days before the trial. Additionally, the state police attempted to serve her with a subpoena both in the week before and the week of the trial.

Under the circumstances of this case, the trial court did not abuse its discretion in finding due diligence by the prosecutor and allowing Ms. Carey's prior testimony to be read at trial.

Defendant's claim that he was denied the effective assistance of counsel when his trial counsel did not call Greene to testify at defendant's trial is also without merit.

This Court's review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the existing record because defendant made no request for either an evidentiary hearing or anew trial. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that council's deficient performance so prejudiced the defendant that the proceedings were fundamentally unfair or unreliable. *Id.* at 714. To show prejudice, the defendant must establish "a reasonable probability that, but for counsel's error, the result would have been different." *Id.*

An attorney's decision of whether to call a witness is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). There is a strong presumption that counsel used sound trial strategy. *Rodgers, supra* at 715. This Court will not substitute its judgment for that of counsel when it comes to matters of trial strategy, or assess trial counsel's decisions with the benefit of hindsight. *Id.*

In this case, trial counsel called only defendant to testify on his own behalf. On appeal, defendant argues that Greene's testimony would have supported defendant's position that he never discussed the delivery of drugs; rather, Greene merely asked defendant for a ride and offered to give him money for the ride, and defendant did not know he was involved in the delivery of drugs. Therefore, defendant argues, Greene's testimony would have been consistent with some of defendant's statements. But even if Greene had testified as defendant suggests, there were multiple police officers who stated that on the night of the incident defendant told them he knew Greene was a small-time dealer, and defendant knew Greene was picking up cocaine, although the quantity was unknown. Defendant has not shown a reasonable probability that Greene's testimony would have produced a different result at trial. *Rodgers, supra* at 714.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski